

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned On Briefs May 29, 2007

**EDDIE GORDON v. TENNESSEE BOARD OF PROBATION AND
PAROLE**

Direct Appeal from the Chancery Court for Davidson County
No. 05-128-I Claudia Bonnyman, Chancellor

No. M2006-01273-COA-R3-CV - Filed on July 30, 2007

The chancery court dismissed Appellant's petition under common law writ of certiorari for review of a 2004 proceeding before the Tennessee Board of Probation and Parole, which denied parole based on the seriousness of Appellant's offense and deferred the next parole hearing for five years. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; and
Remanded**

DAVID R. FARMER, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and HOLLY M. KIRBY, J., joined.

Eddie Gordon, *Pro Se*.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael Moore, Solicitor General, Pamela S. Lorch, Senior Counsel, and Kimberly J. Dean, Assistant Attorney General, for the appellee, Tennessee Board of Probation and Parole.

OPINION

Appellant Eddie Gordon (Mr. Gordon) is an inmate of the Tennessee Department of Correction ("the Department"). In 1984, Mr. Gordon pled guilty to murder in the first degree and currently is serving a life sentence with the possibility of parole. Following a hearing on August 20, 2004, in September 2004 the Tennessee Board of Probation and Parole ("the Board") denied Mr. Gordon parole based on the seriousness of his offense. The Board scheduled Mr. Gordon's next parole hearing for August 2009.

Mr. Gordon filed a petition for writ of certiorari in the Chancery Court for Davidson County in January 2005. In his petition, Mr. Gordon alleged the Board's decision was arbitrary and capricious and that the Board acted illegally. He asserted that the Board failed without justification

to conduct a hearing within a reasonable time prior to his release eligibility date; that the Board's determination was based on incorrect information; that the hearing before the Board was procedurally deficient; and that the Board improperly applied the "seriousness of the offense" rationale to his crime. Mr. Gordon also asserted that the Board's decision to defer his next parole hearing until 2009 violated a liberty interest provided by Tennessee law at the time of his conviction, and that the application of current Board rules amounts to an *ex post facto* application of the law. Mr. Gordon further alleged he was denied equal protection of the law, asserting he "was treated more harshly than typical applicants [who] are black." Mr. Gordon concluded his petition by asserting that the Board failed to consider his current, rehabilitated condition.

The trial court severed Mr. Gordon's equal protection claim, and in April 2006 entered a final order pursuant to Tennessee Rule of Civil Procedure 54.02. The trial court affirmed the Board's decisions to deny parole and to defer Mr. Gordon's next parole hearing for five years. Mr. Gordon filed a motion to amend/supplement his complaint and continue review, which the trial court denied on April 25, 2006. Mr. Gordon filed a timely notice of appeal to this Court. We affirm.

Standard of Review

The common-law writ of certiorari is the procedural vehicle through which prisoners may petition for review of decisions by parole eligibility review boards, prison disciplinary boards, and similar administrative boards and tribunals. *Willis v. Tennessee Dep't of Corr.*, 113 S.W.3d 706, 712 (Tenn. 2003)(citations omitted). "By granting the writ, the reviewing court orders the lower tribunal to file its record so that the court can determine whether the petitioner is entitled to relief." *Id.*

Review under a common-law writ of certiorari is limited to a determination of whether the disciplinary board exceeded its jurisdiction or acted illegally, fraudulently, or arbitrarily. *Id.* The reviewing court is not empowered "to inquire into the intrinsic correctness of the board's decision." *Id.* The Tennessee Supreme Court has held that a common-law writ of certiorari may be used to remedy "(1) fundamentally illegal rulings; (2) proceedings inconsistent with essential legal requirements; (3) proceedings that effectively deny a party his or her day in court; (4) decisions beyond the lower tribunal's authority; and (5) plain and palpable abuses of discretion." *Id.*(citing *State v. Willoughby*, 594 S.W.2d 388, 392 (Tenn.1980)). The reviewing court does not re-weigh the evidence, but must uphold the board's decision if the board acted within its jurisdiction and did not act illegally, arbitrarily, or fraudulently. A board's determination is arbitrary and void if it is unsupported by any material evidence. *Watts v. Civil Serv. Bd. of Columbia*, 606 S.W.2d 274, 276-77 (Tenn. 1980). Whether material evidence supports the board's decision is a question of law to be decided by the reviewing court based on the evidence submitted to the board. *Id.* at 277.

Our review of the trial court's conclusions on matters of law is *de novo* with no presumption of correctness. *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000); Tenn. R. App. P. 13(d). However, this Court's scope of review of the board's determination "is no broader or more comprehensive than that of the trial court with respect to evidence presented before the [b]oard." *Watts*, 606 S.W.2d at 277. Upon review, this Court will not "inquire into the intrinsic correctness

of the [b]oard's decision," but will uphold the decision if it was reached lawfully and in a constitutional manner. *Hopkins v. Tennessee Bd. of Paroles and Probation*, 60 S.W.3d 79, 82 (Tenn. Ct. App. 2001).

Analysis

We first address Mr. Gordon's assertion that the Board's decision violates equal protection. As noted, the trial court entered final judgment in this case pursuant to Tennessee Rule of Civil Procedure 54.02, severing Mr. Gordon's equal protection claim from its review of the Board's procedure. Accordingly, this issue is not now before this Court.

We begin our analysis of the issues presented by this appeal by noting that denial of parole based on the seriousness of the offense is a proper ground for denial under Tennessee law. Tenn. Code Ann. § 40-35-503(b)(2)(2006). It is undisputed that Mr. Gordon has pled guilty to the 1983 murder of Connie Sawyer (Ms. Sawyer), his former girlfriend and mother of his child. Mr. Gordon acknowledges that on August 1, 1983, he disconnected the telephone at his family's home; walked, carrying a shotgun, to the home of Ms. Sawyer's sister, where Ms. Sawyer was residing with their fourteen-month old child; banged on the doors and windows of the home and, receiving no answer, threw a lighted cigarette into a trash can and started a fire. He further admits that when Ms. Sawyer ran out of the house carrying the baby, Mr. Gordon shot her in the face with the shotgun from a distance of approximately ten to fifteen feet. Although Mr. Gordon asserts the Board should consider the rehabilitated person he has become while incarcerated, we do not agree that denial of parole based on the seriousness of the offense in this case is patently unfair, arbitrary, or capricious.

We next address Mr. Gordon's assertion that the Board violated his due process rights by conducting his parole hearing on August 20, 2004, rather than on his release eligibility date ("RED") of July 13, 2004. As the trial court noted, this claim must fail because a prisoner does not have a constitutionally protected liberty interest in parole. Parole is a privilege, not a right. Tenn. Code Ann. §§ 40-28-117(a) & 40-35-503(b) (2006); *Hopkins*, 60 S.W.3d at 82. Further, we cannot say the five week delay between Mr. Gordon's RED and his August hearing was unreasonable or that it resulted in any harm or prejudice to Mr. Gordon where the Board's decision was based exclusively on the seriousness of Mr. Gordon's crime.

We turn next to Mr. Gordon's assertion that the Board's deferral of the next parole review for five years is arbitrary and unconstitutional. Mr. Gordon contends that, when he was sentenced, the Board rules provided that if a prisoner was denied parole the Board was required to set a future hearing date within one year of the current hearing. He contends that this rule was amended in 1992, and that application of the amended rule is unconstitutional.

Under article I, section 11 of the Tennessee Constitution, an *ex post facto* violation occurs when a law

(1) provides for the infliction of punishment upon a person for an act done which, when it was committed, was innocent, (2) aggravates a crime or makes it greater than when it was committed, (3) changes punishment or inflicts a greater punishment than the law annexed to the crime when it was committed, (4) changes the rules of evidence and receives (sic) less or different testimony than was required at the time of the commission of the offense in order to convict the offender, and (5) in relation to the offense or its consequences, alters the situation of a person to his disadvantage.

State v. Odom, 137 S.W.3d 572, 582 (Tenn. 2004)(quoting *Miller v. State*, 584 S.W.2d 758, 761 (Tenn.1979) (citing *State v. Rowe*, 116 N.J.L. 48, 181 A. 706, 709-10 (1935))). The 1992 amendment to the Board's rules does not alter Mr. Gordon's sentence, and it does not relate to the elements of his crime or the evidence required to prove that crime. Rather, as this Court previously has noted, the amendment to the Board's rules was a procedural change and not unconstitutional on its face. *Baldwin v. Tenn. Bd. of Paroles*, 125 S.W.3d 429, 433 (Tenn. Ct. App. 2003). Although the determination of a prisoner's initial eligibility for parole is a function of the Department, the Board may schedule subsequent hearings in accordance with the Board's rules. *Id.* at 434 n.1 (citing *See Board of Paroles Rule No. 1100-1-1-.07(1)(b)*). Additionally, as noted above, a prisoner has no liberty interest in parole. Thus, application of the Board's rules as amended in 1992 affects no constitutional right or expectation.

Additionally, we agree with the trial court's determination that the Board's decision to defer the next hearing date for five years was not arbitrary. As Mr. Gordon asserts, in some cases lengthy deferrals may be determined to be unjustified and arbitrary. In *Baldwin*, for example, we determined that a twenty-year deferral was arbitrary where it

not only . . . preclude[d] reconsideration of Mr. Baldwin's case by the members of the panel that declined to parole him, or by the other members of the current Board, but also prevent[ed] the members of the Board that may be sitting in the years 2005, 2010, 2015 or 2020 from even making an initial consideration of whether Mr. Baldwin could be a suitable candidate for parole.

Id. at 434. We further noted in *Baldwin* that, "[u]nder the panel's ruling, it [was] possible that the entire membership of the Board [could] completely turn over more than once before his case comes up for decision once again." *Id.*

In Mr. Gordon's case, however, because the members of the Board serve staggered six-year terms, some of the Board members who served on the Board in 2004 will continue to serve in 2009, when Mr. Gordon's next parole hearing is scheduled. Further, as the trial court found, the deferral was calculated, in part, to provide the Board with further information where, although Mr. Gordon received only fourteen disciplines in twenty-one years, his crime was so violent, direct, and intentional. In light of the entirety of the record, we cannot say the Board's deferral for five years was arbitrary.

We next turn to Mr. Gordon's contention that the format and procedure of his August 2004 hearing was deficient. We agree with the trial court that it was not. The hearing transcript reflects that Mr. Gordon was provided an opportunity to respond to the Board's questions, to testify as to his efforts at rehabilitation in prison, to make statements to the Board, and to read recommendations into the record. We agree with the trial court that the proof at the hearing developed as the Board had advised Mr. Gordon that it would. Additionally, we cannot agree with Mr. Gordon that the Board's decision was grounded on inaccurate information or false statements provided by speakers at the hearing, relatives of Ms. Sawyer, where it was based on the seriousness of Mr. Gordon's offense.

Holding

In light of the foregoing, the judgment of the trial court is affirmed. Costs of this appeal are taxed to the Appellant, Eddie Gordon.

DAVID R. FARMER, JUDGE